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5 **UNITED STATES OF AMERICA**
6 **BEFORE THE NATIONAL LABOR RELATIONS BOARD**

7 **Seattle University,**

8 **Employer,**

9 **and**

Case 19-RC-122863

10 **Service Employees International Union,**
11 **Local 925,**

12 **Petitioner.**

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15 **SEATTLE UNIVERSITY'S REQUEST FOR REVIEW OF THE REGIONAL**
16 **DIRECTOR'S DECISION AND DIRECTION OF ELECTION**
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1 I. INTRODUCTION

2 Seattle University requests review of Region 19's Decision and Direction of Election in
3 *Seattle University and Service Employees International Union, Local 925*, Case 19-RC-122863,
4 issued April 17, 2014. The University requests review under Section 102.67(b) and (c) of the
5 National Labor Relations Board's ("the Board's") Rules and Regulations.

6 First, the University requests review of the Regional Director's finding that the Board has
7 jurisdiction over the University under the Board's "substantial religious character" test. The
8 "substantial religious character" test is contrary to the United States Supreme Court's holding in
9 *NLRB v. Catholic Bishop of Chicago*¹ and has been invalidated and found to be unconstitutional
10 by the District of Columbia Court of Appeals in *University of Great Falls v. NLRB*.² The
11 University believes there are compelling reasons for reconsideration of the Board's test in light
12 of these court mandates. The Board should discard the constitutionally infirm "substantial
13 religious character" test and adopt the "bright line" test of the D.C. Circuit in *University of Great*
14 *Falls*. The Board lacks jurisdiction in this case because the University clearly meets the "bright
15 line" test.

16 Second, the Regional Director's determination that the University's full-time non-tenure
17 track faculty are not managerial is incorrect, departs from officially reported precedent and
18 misapplies the factors outlined in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). The
19 University's full-time non-tenure track faculty meet the *Yeshiva* factors.

20 Third, the Regional Director's finding that the University's full-time and part-time non-
21 tenure track faculty share a community of interest is factually erroneous and disregards
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23 ¹ *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

24 ² *Univ. of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir., 2002).

precedent. Furthermore, the exclusion of faculty from the College of Nursing and School of Law is inherently contradictory and in conflict with *Specialty Healthcare*.³

The University notes that there are pending reviews by the Board of the question of jurisdiction over religiously operated or affiliated universities in *Saint Xavier University*, Case 13-RC-22025, *Manhattan College*, Case 2-RC-23543, *Duquesne University of the Holy Spirit*, Case 6-RC-08933, and most recently in *Pacific Lutheran University*, Case 19-RC-102521 (“*Pacific Lutheran University*”). Significantly, on September 23, 2013 the Board agreed to review Region 19’s Decision and Direction of Election relating to the Regional Director’s finding of Board jurisdiction over Pacific Lutheran University (“PLU”), and his finding that certain PLU faculty are not managerial employees under *Yeshiva*. On February 10, 2014, the Board invited interested parties to submit briefs on these two questions in its review of *Pacific Lutheran University*. It is clear that the Board is revisiting its tests for jurisdiction over religiously-affiliated colleges and universities and the application of *Yeshiva* in today’s higher education setting. Consequently, it is proper to accept the University’s request for the Board to review Region 19’s decision in the instant case in order to fashion and apply consistent Board standards and to promote administrative efficiencies in the processing of this case and similar pending cases before the Board.

II. THE REGIONAL DIRECTOR USED AN UNCONSTITUTIONAL STANDARD TO ASSERT BOARD JURISDICTION OVER SEATTLE UNIVERSITY

A. Seattle University’s Catholic and Jesuit Foundation and Operation.

Seattle University (“the University” or “the Employer”) is a Catholic Jesuit university

³ *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), *enf’d*, *Kindred Nursing Centers East, LLC v. NLRB*, 2013 U.S. App. LEXIS 16919 (6th Cir., 2013) (“*Specialty Healthcare*”).

1 founded in 1891. The University is located in Seattle and its faculty teach on the main campus
2 and at several off-campus locations. *Tr. 643-44*. There are approximately 7,400 students, of
3 which 60 percent are undergraduates. *Tr. 314:5-6*. The University employs approximately
4 1,300 people. *Tr. 314:9-10*. Approximately 730 of those employees are faculty members,
5 including tenured, tenure-track and non-tenure track faculty. *Tr. 314:11-12*. The University is
6 also home to a resident Jesuit community. *ER Ex. 2, Article VI; ER Ex. 21 (showing Jesuit*
7 *residences in campus residence halls)*. The Jesuit community at the University is an autonomous
8 unit within the corporation of the University. The principal apostolate of this religious
9 community is the work of Catholic higher education at the University. *ER Ex. 2, Article VI*.

10 The Society of Jesus is a religious order of the Catholic Church. St. Ignatius of Loyola
11 founded the Society of Jesus, members of which are commonly known as Jesuits, more than 450
12 years ago. In that year, the Society received Papal approbation as a religious institution within
13 the Catholic Church. *Tr. 27:19-22*. The spirituality practiced by the Jesuits, called Ignatian
14 Spirituality, is based on the Catholic faith. Jesuit priests live in communities and exercise a
15 special kind of work rather than being in charge of a parish. *Tr. 27-28*.

16 The Superior General of the Society of Jesus is Father Adolpho Nicolas, who is based in
17 Rome. The Superior General is elected by Jesuit delegates for life, upon the death of his
18 predecessor. The Society has 17,000 members and is divided into 85 provinces around the
19 world, each of which is headed by a Father Provincial, or "Provincial," chosen by the Superior
20 General. *Tr. 34:1-6*. There are nine Provinces in the United States. The Oregon Province
21 includes Alaska, Idaho, Montana, Oregon and Washington. *Tr. 33:25; 34:1*. The Provincial has
22 authority over all Jesuits and ministries in his province. Provincials are appointed for six-year
23 terms, and they report directly to the Superior General. Every Jesuit has to have a Superior. A
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1 Jesuit priest lives in a community and has a Rector who is his Superior. The Rector has the
2 Provincial as his Superior, and the Provincials have the Superior General as their Superior. *Tr.*
3 *36:1-19.*

4 The Provincial must approve of the selection of the University's President prior to that
5 person being appointed by the Board of Trustees. *Tr. 39-40.*

6 Father Stephen Sundborg, S.J.⁴ is the University's President. Before becoming President,
7 Father Sundborg was the Provincial for the Oregon Province from 1990 to 1996. As Provincial,
8 he met annually with the Superior General in Rome and gave an accounting of what he was
9 carrying out within the province. *Tr. 36:20-23.* On a local level, the Provincial recommends to
10 the Superior General in Rome a leader of each Jesuit community. The "Rector" oversees the life
11 of the community and the individual members of the community. *Tr. 38:5-9.* The University
12 has a Rector overseeing the Jesuit community, including Father Sundborg. *Tr. 70:180; ER Ex.*
13 *2, Article VI.*

14 **1. Jesuit Emphasis on Education.**

15 Although the work of the Jesuits involves a wide variety of ministries and occupations,
16 Jesuits are well-known and respected educators. Since the inception of the order, Jesuits have
17 been teachers. The Society founded its first university in Messina, Italy in 1547. *Tr. 223:13-16.*
18 The University is one of 28 Jesuit universities in the United States and more than 100 around the
19 world. *Tr. 53-54.* The Catholic Jesuit approach to higher education embodies a strong
20 commitment to the liberal arts tradition of educating students broadly and deeply in a variety of
21 areas, particularly at the undergraduate level, with a strong focus on Theology and Philosophy.
22 *Tr. 313:4-9.* This embodies a strong commitment to academic excellence and rigor, but with the

23 ⁴ The initials "S.J." stand for "Society of Jesus," and are used by Jesuit priests to denote their religious order.
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1 opportunity for students to be able to understand what they learn and to be able to apply it. *Tr.*
2 *313:4-9*. The Jesuit approach seeks to allow a person to gain a deeper understanding of the
3 world around him or herself, a deeper understanding of him or herself, and a deeper
4 understanding of him or herself with God or his or her spiritual religious nature. *Tr.* *602:1-11*.
5 This approach encourages students to use that education to affect change in the world and to be
6 of service to others in following the teachings of Jesus Christ with a particular focus for the poor
7 and the disenfranchised. *Tr.* *602:15-19*.

8 In the 1950's, the Jesuit higher-education community redefined its educational mission at
9 its universities. Many Jesuit colleges and universities changed their hiring practices to hire the
10 best faculty possible, one who "resonates" with the Jesuit mission but who is not necessarily a
11 person of the Catholic faith or Jesuit tradition. *Tr.* *1424:6-14*. Accordingly, the modern Jesuit
12 approach is a "more inclusive type of approach to Catholicism" in which "you're teaching
13 Catholic values to everybody. You're not teaching the Catholic religion to everybody." *Tr.*
14 *1425:21-23*. The University's "inclusive Catholic character," as noted by Father Sundborg,
15 engages other faiths and belief systems as part of the Jesuit mission. "[I]t shows the...way in
16 which we carry out being Catholic by -- by reaching out ecumenically and inter-religiously and
17 welcoming people from those traditions to contribute to our mission." *Tr.* *85:8-24*. Religious
18 "litmus" tests of faculty and students, therefore, would be contrary to the way the Jesuits practice
19 their Catholic faith. *Tr.* *86*. In fact, the Jesuit inclusiveness paradigm appeals to individuals of
20 other faiths. "Part of our Catholic identity is to support the faith of any of our students in
21 whatever their religious tradition is, and that's part of being an inclusively Catholic university.
22 Therefore, we reach out to Protestant faith communities, Muslim, Jewish, others...out of our
23 Catholic principles of inclusion." *Tr.* *185:18-25; 186:1-5*. Father Peter Ely, S.J., the
24

1 University's Vice President for Mission and Ministry, offered an illustration: "[W]hat
2 characterizes Seattle University is [that] it's inclusive. And the important thing to me is that
3 being inclusive does not mean being less Catholic. And I think it would be easy for people to
4 read it that way, because 'inclusive' seems to mean that you're open to other things and,
5 therefore, you're not rigidly or exclusively Catholic. And if you look at Pope Francis, I think he
6 represents that inclusive form of -- he's very Catholic, but he's also very inclusive." *Tr. 287:1-9.*

7 To the Jesuits, education by its nature is not strictly secular. According to Father
8 Sundborg:

9 [T]he Jesuit education does not like the distinction between sacred and secular because
10 we believe we can find the sacred within the secular. So we don't tend to talk about
11 secular society and then religious society, but rather what we're about is engagement with
12 culture and that within that culture there are various kinds of sacred dimensions. And so
13 when you talk about a secular purpose, yes, we're training lawyers and we're training
14 business people and we're educating people who will work in criminal justice systems
15 and so forth, and their careers will be, sort of on [face] value, secular careers. But we
16 believe the kind of education that we offer of the whole person and with the -- the respect
17 for the transcendental or religious dimension of the person, that they will carry that out in
18 a -- in a different kind of way than is simply secular, if you mean by secular sort of the
19 exclusion of God from that realm. So we do have a secular purpose and no one's required
20 to adopt a religious position at Seattle University. But we treat people as having a
21 religious dimension.

22 *Tr. 88:15-25; 89:1-2.*

23 **2. The University's Mission, Vision, and Values.**

24 The University's Mission, Vision, and Values Statements reflect its Catholic Jesuit
foundation. The Mission Statement is as follows: "Seattle University is dedicated to educating
the whole person, to professional formation, and to empowering leaders for a just and humane
world." *ER Ex. 6.* The University has also adopted the following Vision Statement: "We will be
the premier independent university of the Northwest in academic quality, Jesuit Catholic
inspiration, and service to society." *Id.* The University's Values reflect its Catholic Jesuit

1 character in the areas of Care, Academic Excellence, Diversity, Faith, Justice and Leadership.
2 Under “Faith,” the Values Statement reads: “We treasure our Jesuit Catholic ethos and the
3 enrichment from many faiths of our university community.” The University’s Mission, Vision,
4 and Values Statements are on display in many campus buildings, including residence halls and in
5 classrooms, as well as on the University’s website.⁵ *Tr.* 274:19-25.

6 **3. Jesuit Catholic Charism on Campus.**

7 The Jesuit approach to Catholicism underscores everything that the University attempts
8 to accomplish as an academic institution. *Tr.* 313:16-17; *See also ER Ex. 16 (diagram*
9 *describing integrated Jesuit education), ER Ex. 17 (the University’s “Undergraduate Learning*
10 *Objectives” that are rooted in Jesuit traditions).* Dr. Isiaah Crawford, University Provost,
11 ensures that the courses, certificates, and degree programs offered by the University embody the
12 Jesuit Catholic Charism.⁶ *Tr.* 312:14-24. Jesuits emphasize social justice, which, in the Jesuit
13 tradition, translates into a belief that all humans deserve respect and dignity regardless of
14 background, faith, status, or social or political affiliation. *Tr.* 1148. The Jesuit social justice
15 mission “pervades the core curriculum” in terms of its teaching goals and is present in many
16 student activities centered on social activism. *Tr.* 1149. As a result, the University particularly
17 aims for its students to use their education to engage in actions for the betterment of the world.
18 *Tr.* 313:10-16. For example, the School of Theology and Ministry provides educational
19 programming for those looking to go into pastoral work. *Tr.* 316:18-24. It has an ecumenical
20 focus, offering programs in pastoral studies, a Master’s Degree in Divinity, and a program in
21 transformational leadership. It provides a professional education for those seeking to perform
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23 ⁵ Available at: <https://www.seattleu.edu/about/mission/>.

24 ⁶ Merriam-Webster’s Online Dictionary defines Charism as “an extraordinary power (as of healing) given a
Christian by the Holy Spirit for the good of the church.” (<http://www.merriam-webster.com/dictionary/charism>).

1 professional ministerial work. Another example of how the Catholic and Jesuit character of the
2 University influences educational offerings can be found in the nursing program. The University
3 does not allow its nursing students to engage in training or study on procedures that involve the
4 termination of human life. *Tr.* 672:7-9; 685.

5 The University encourages its faculty to develop a deep knowledge and appreciation for
6 the Jesuit paradigm. *Tr.* 601. Its *2009-2014 Academic Strategic Action Plan* contains a
7 “Comprehensive Faculty Development” section that describes opportunities for spiritual
8 development training and learning experiences concerning Jesuit pedagogy and the Ignatian
9 Paradigm. *ER Ex.* 29; *Tr.* 601. The University expects that Catholic social teaching informs the
10 faculty’s thoughts and interests relating to their scholarship and looks for faculty to incorporate
11 Catholic social teaching as they deem appropriate within their coursework. *Tr.* 601.

12 Furthermore, the University ensures that finalists for tenured positions are very much aware of
13 the University’s Jesuit mission and approach by sending them information concerning Catholic
14 social teachings, Ignatian pedagogy and paradigm information about the University mission.

15 The finalists are asked to read those materials and to write an essay concerning how their work,
16 training, and scholarly interests would help to support and advance the University’s mission as a
17 Jesuit Catholic Institution. *Tr.* 607:22025; 608:107; *ER Ex.* 30. Mission and related topics are
18 also covered in their interviews and upon hire. For example, President Sundborg, in a 2012
19 address for all new faculty hires, spoke about fulfilling the University’s mission by engaging in a
20 spiritual sense. *Tr.* 1136; *See also ER Ex.* 72 (*New Faculty Institute 2013 materials showing*
21 *“Jesuit Reception,” “Jesuit Dinner,” and a session on “The Jesuit Tradition and Teaching” on*
22 *the agenda*). Indeed, the Faculty Handbook states that:

23 Recognition of the religious dimension of human life is fundamental to the identity of a
24 Jesuit university. For Seattle University to achieve its mission and to maintain its

1 identity, its faculty must be a community of scholarly persons with an acknowledgment
2 of or a respect for its Catholic religious and cultural tradition. Each member of the
3 faculty is expected to show a respect for the religious dimension of human life...*Given*
4 *the Jesuit tradition and educational philosophy of Seattle University, the ability to*
5 *contribute actively in a variety of ways to the Jesuit ethos of the University's educational*
6 *work is a quality which the University seeks in prospective faculty members and*
7 *recognizes in all faculty as a significant asset."*

8 *ER Ex. 3, Section 3.1(b) and (c)(emphasis added).*

9 While the hiring process for non-tenure track positions is less formal in this regard, the
10 same focus and questions are impressed upon and asked of full-time non-tenure track
11 interviewees. *Tr. 608:21-25; 609:107.*

12 The University's Jesuit mission seeks out faculty without regard to their religious
13 affiliation and encourages faculty to respect one another's beliefs, whatever they may be. *Tr.*
14 *85:8-24; ER Ex. 3, Section 10.2.* There is an expectation, however, that faculty do not
15 misrepresent or provide a false depiction of Catholic doctrine or dogma. As Father Sundborg
16 states: "We simply expect that [faculty] respect our Catholic character ...that they don't present
17 as Catholic what is not Catholic and they do not misrepresent what the Catholic church teaches."
18 *Tr. 90:8-13; See also ER Ex. 3, at 34 (describing requirement of respect for Catholic religious*
19 *and cultural traditions and beliefs).*

20 Another example of Catholic presence on campus is the University's Institute for
21 Catholic Thought and Culture. *ER Ex. 7.* In the *Academic Strategic Action Plan*, the University
22 established the Institute for Catholic Thought and Culture, which is a University-wide Institute
23 that offers fellowships for research, and scholarships, education and professional development
24 for faculty, staff, and students that focuses on Catholic social thought. *ER Ex. 29; Tr. 603:7-14.*
The Institute brings together national scholars and theologians for presentations and symposia
Tr. 603:21-25. There are also a Colleagues program and "Arrupe Seminars" (named after former

1 Jesuit Superior General Father Pedro Arrupe) available at the University through which faculty
2 and staff come together to study Ignatian spirituality and Catholic social thought. *Tr. 604:2-11;*
3 *ER Ex. 11.* In addition, each year the University holds a convocation on the University's Jesuit
4 mission. Classes are canceled for the convocation, called "Mission Day," which addresses
5 aspects of the Catholic Jesuit mission of the University. *Tr. 606:18-22, 607:1-7.* Core Jesuit
6 values are also promoted through the University's policy that allows faculty and staff to take
7 time off, with pay, to participate in community service activities. *Tr. 604:14-18.* Participation in
8 all of the above activities is strongly encouraged. *Tr. 605:3.*

9 There are additional numerous ways that faculty, staff, and students alike can engage the
10 Catholic Tradition on Campus. *ER Ex. 10 (listing opportunities to engage in Catholic practice*
11 *and tradition).* These include daily Catholic Masses, the availability to receive the sacraments
12 on campus, silent scripture-based retreats, Campus Ministry and student-run faith groups,
13 religious music performances by the Fine Arts Department, and a Catholic Mass specifically for
14 alumni. *ER Ex. 10.* In these various ways, the University engages faculty, staff, and students to
15 participate in the Catholic Jesuit Charism underscoring the University's mission. *Tr. 606:1-4.*

16 **4. The Catholic Jesuit Core Curriculum at the University.**

17 At the heart of the University's undergraduate program is its Core Curriculum. *Tr.*
18 *765:22 (It is "the center of gravity of a Seattle University education").* Approximately 95% of
19 undergraduates go through the Core. *Tr. 766:3.* The Core has been taught at the University
20 since its inception. *Tr. 766:23-24.* The Core involves twelve courses spread out across three
21 different modules, plus a module in a student's major. All students must take two philosophy
22 courses and one Catholic theology course. A second theology course includes comparative
23 religious studies with Catholicism as the baseline. *Tr. 767:14-23; ER Ex. 39.*

1 The *University Core Curriculum Learning Objectives* describe the nature of the Core,
2 and how that nature informs the curriculum.

3 Rooted in Jesuit, Catholic educational traditions, the primary aim of Seattle University's
4 Core Curriculum is formative and transformative liberal education. The key elements of
5 this curriculum are foundational knowledge in several relevant disciplines, critical
6 inquiry, reflection on learning and values, and preparation for life as an effective and
7 ethical global citizen.

8 *ER Ex. 37.*

9 The Core's learning objectives are derived from the University's undergraduate learning
10 objectives, and shaped by four broad goals, each of which has specific knowledge, skills and
11 values associated with it. The first of these goals is rooted in "Jesuit Catholic Intellectual
12 Traditions:"

13 Through knowledge of Jesuit, Catholic intellectual traditions and understanding of
14 diverse religious traditions, students will reflect on questions of meaning, spirituality,
15 ethics, values, and justice.

16 Knowledge:

- 17 • Understand academic traditions (theological, philosophical, etc.) on which Jesuit
18 education is based
- 19 • Understand Catholic theology
- 20 • Understand Jesuit, Catholic perspectives within the context of world religions.

21 Skills:

- 22 • Ability to articulate one's own spiritual/religious perspective
- 23 • Ability to appreciate and reflect on religious and spiritual perspectives other than
24 one's own

Values:

- Respect for religious diversity

ER Ex. 37.

The University's Core is a tightly integrated core reflective of the University's Catholic
Jesuit character. An integrated, "core" curriculum has been part of the Jesuit educational

tradition since at least 1599, with the publication of the *Ratio Studiorum*,⁷ which was the initial Jesuit handbook for how to run a curriculum in a school. *Tr. 770:4-8*. It is “a transformational core; it’s trying to create certain skills, values, sensibilities, world views” that form students in ways consistent with the Jesuit mission. It aspires to develop certain kinds of capabilities, knowledge, skills and values to help prepare students to be a certain kind of person in the world. *Tr. 771-772*. Dr. Jeff Philpott, who directs the Core, contrasted this with other models found at most colleges and universities, where “[y]ou take a little bit of this and a little bit of that and a little bit of other things” in a series of one-off courses. *Tr. 770:17-23*.

What sets the University’s Core apart is its strong emphasis on Theology and Philosophy, both central elements of Jesuit education for 450 years. *Tr. 771:10-16*. All students must take a theology course that studies the Catholic Jesuit tradition. *Tr. 784:3-8; ER Ex. 38 (UCOR 2100 Course Description)*. “Religion in a Global Context,” studies a non-Catholic or at least non-Western Catholic religious tradition and tries to put it into dialogue with Catholic tradition in some way. *Tr. 784:20-22; ER Ex. 38 (UCOR 3100 Course Description)*. The Philosophy requirement continues 450 years of Jesuit education tradition and is designed to promote “philosophical reflection” and the Jesuit belief that God is in all things and the individual’s personal responsibilities to, and relationship with, others. *Tr. 787:14-25, 788:1-5*.

5. The University’s Structure within the Society of Jesus.

The University’s corporate structure ensures the University is accountable to the Society of Jesus in carrying out its Catholic and Jesuit mission.

⁷ This is an abbreviated title for “*Ratio atque Institutio Studiorum Societatis Jesu*,” i.e., “Method and System of the Studies of the Society of Jesus.” *The Catholic Encyclopedia*, available at <http://www.newadvent.org/cathen/12654a.htm>.

1 The Board of Members consists of seven Jesuits who are members of the University's
2 Jesuit community. *Tr. 68:18-25; ER Ex. 2, Articles I and II.* The Board of Members ensures
3 that the University will carry out Catholic higher education within the Jesuit tradition. *Tr. 68:18-*
4 *25; ER Ex. 2, Section VIII.* The Members are "there simply as sort of a guarantee that in a worst
5 case scenario that if this university ever were to begin to move away from being Catholic and
6 Jesuit there would be something that would prevent it from doing so and that this group would
7 [be] the authority, which is essentially kind of a carrying out of the responsibility of the Catholic
8 church and the province to assure that this university continued to be Catholic and to be Jesuit."
9 *Tr. 71:7-14.*

10 The Board of Members elects three Jesuits to sit on the Board of Trustees. The Board of
11 Members has the sole authority to alter, amend and repeal the University's Bylaws or Articles of
12 Incorporation. *Tr. 69:2-8.* Typically, the Board of Trustees brings to the Board of Members any
13 changes in the bylaws that the Board of Trustees thinks are appropriate or necessary, and the
14 Board of Members considers and decides whether or not to approve the changes. The Board of
15 Members, however, can also initiate changes to these governance documents. *Tr. 69-70.* The
16 Board of Members has sole authority to approve the alienation of property valued at more than
17 \$300,000. *Tr. 69:16.*

18 The ultimate authority for carrying the Catholic mission of the University lies with the
19 Board of Trustees, which delegates its authority to the President. *Tr. 47:13-22; ER Ex. 2, Article*
20 *III.* The University's Bylaws require that seven of the 35 members of the Board of Trustees must
21 be Jesuit priests. *Tr. 28:8-10; ER Ex. 2.* The Board of Trustees receives recommendations and
22 presentations on topics that originate within departments of the various colleges or schools, the
23 Academic Assembly, and the Provost's and President's Offices. For example, the Board of
24

1 Trustees must approve the University's Strategic Plan and annual budget. *Tr. 59:11-12; ER Ex.*
2 *2, Article V, Section 2.* The Board of Trustees utilizes several committees to manage the affairs
3 of the University. For example, the Academic Affairs Committee of the Board of Trustees
4 addresses all matters of concern regarding academic curriculum, faculty matters, research and
5 scholarship of the faculty, staff and students. *Tr. 306:19-23.*

6 Twenty of the 30 current Trustees are Catholic. *Tr. 114:19-20.* This number includes the
7 seven Jesuit priests. *Tr. 114:9.* Every Board of Trustees meeting begins with a prayer, and the
8 Jesuit Provincial visits the Board once a year to address that body. *Tr. 114:24-25; 115:1-2.*
9 There is a Catholic Jesuit Identity Committee of the Board of Trustees to further engage the
10 Board with the Catholic Jesuit mission. *Tr. 68:1-13.*

11 The University's Bylaws require that the University President be a Jesuit priest in good
12 standing with the Society of Jesus. *Tr. 28:10-13; ER Ex. 2, Article III, Section 2.* The President
13 is elected by a majority vote of the Board of Trustees. *ER Ex. 2, Article V.* The requirement that
14 a Jesuit priest holds the office of President allows the President to exercise his pastoral ministry
15 with the people of the University, its alumni and with the community at large. *Tr. 23-25: 29-1.*
16 The President is called the Director of Apostolic Work, which means that he is officially
17 "missioned" by the Provincial to carry out his work in accordance with Jesuit principles and
18 pledges to foster Jesuit values within the work that he carries out. *Tr. 41-42.* The President is in
19 charge of appointing various officers of the University subject to Board of Trustees approval.
20 *ER Ex. 2, Article V.*

21 The University President has monthly contact with Archbishop Peter Sartain of the
22 Catholic Archdiocese of Seattle concerning various issues that arise and evolve at the University,
23 particularly those that are sensitive topics for Catholics. *Tr. 47:13-22; 52-53.* President
24

1 Sundborg testified that he has ongoing dialogue with the Archbishop, whether it be hearing
2 concerns or receiving encouragement. *Tr.* 47:13-22. In carrying out this pastoral task of
3 operating a Catholic Jesuit university, President Sundborg seeks the Archbishop's input and
4 listens to the Archbishop's proposals monthly. *Tr.* 47:13-22.

5 **B. The "Substantial Religious Character" test upon which the Regional Director relied**
6 **is inconsistent with Constitutional requirements.**

7 **1. The Catholic Bishop holding.**

8 In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court held
9 that the National Labor Relations Act excludes religious educational institutions because
10 exercising jurisdiction would result in excessive entanglement in violation of the First
11 Amendment. *Id.* at 507. The Court found that to allow otherwise would "necessarily involve
12 inquiry into the good faith of the position asserted by the clergy-administrators and its
13 relationship to the school's religious mission." *Id.* at 502. The Court stated that the Board's
14 engagement in such an inquiry would itself violate the First Amendment and would "give rise to
15 entangling church-state relationships of the kind the Religion Clauses [of the First Amendment]
16 sought to avoid." *Id.*, quoting *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

17 **2. The Board's "substantial religious character" test since *Catholic Bishop*.**

18 Since *Catholic Bishop*, the Board has decided on a case-by-case basis whether a
19 religious-affiliated school has a "substantial religious character" to fall outside of Board
20 jurisdiction. The Board scrutinizes "all aspects of a religious school's organization and function
21 that may be relevant to 'the inquiry whether the exercise of the Board's jurisdiction presents a
22 significant risk that the First Amendment will be infringed.'" *Trustees of St. Joseph Coll.*, 282
23 NLRB 65, 68 n. 10 (1986). This inquiry includes the extent to which the affiliated religious
24 group is involved in the daily operation of the school, the degree to which the school has a

1 religious mission and curriculum, and whether the school uses religious criteria in appointing or
2 evaluating faculty. *Id.* The Regional Director used this test to find the Board has jurisdiction
3 over the University in the instant case.

4 **3. The federal courts' and Petitioner's rejections of the "substantial religious**
5 **character" test.**

6 Courts have repeatedly rejected the "substantial religious character" test because it
7 "involve[s] just 'the sort of intrusive inquiry that [the Supreme Court's ruling in] Catholic
8 Bishop sought to avoid,' with the [Board] trolling through the beliefs of schools, making
9 determinations about their religious mission, and that mission's centrality to the primary purpose
10 of the school." *Carroll College v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009); *Univ. of Great*
11 *Falls v. NLRB*, 278 F.3d 1335, 1341-1342 (D.C. Cir. 2002); *see also Colorado Christian Univ. v.*
12 *Weaver*, 534 F.3d 1245, 1263-1264 (10th Cir. 2008); *Universidad Central de Bayamon v. NLRB*,
13 793 F.2d 383, 399-403 (1st Cir. 1986) (en banc, 3-3 decision) (then-Judge Breyer rejecting the
14 Board's test). As stated by the D.C. Circuit in *University of Great Falls*, "the nature of the
15 Board's inquiry boils down to 'is [the institution] *sufficiently* religious?'" 278 F.3d at 1343
16 (emphasis in original). Under the Board's test, the more "closed" or exclusionary the religious
17 institution is, the less likely the Board will impose its jurisdiction. This test, therefore,
18 differentiates between institutions based on their religious creeds and practices, and also between
19 institutions belonging to the same religious tradition but with different practices and traditions
20 within that religion. The D. C. Circuit found this untenable:

21 If the University is ecumenical and open-minded, that does not make it any less religious,
22 nor NLRB interference any less a potential infringement of religious liberty. To limit the
23 *Catholic Bishop* exemption to religious institutions with hard-nosed proselytizing, that
24 limit their enrollment to members of their religion, and have no academic freedom...is an
unnecessarily stunted view of the law, and perhaps even itself a violation of the

1 Establishment Clause—not to prefer some religions (and thereby some approaches to
2 indoctrinating religion) to others.

3 278 F.3d at 1346.

4 The court continued: “That a secular university might share some goals and practices
5 with a Catholic or other religious institution cannot render the actions of the latter any less
6 religious.” *Id.* A Catholic university that educates students is no less religious merely because a
7 public university also educates students. Clearly, it makes neither the Catholic university nor its
8 purpose “secular.”

9 Even the Petitioner in this case agrees with the D.C. Circuit, calling the “substantial
10 religious character” test “mistaken.” In a brief filed in *Pacific Lutheran University*, the
11 Petitioner encourages the Board to “abandon the ‘substantial religious character’ test it has
12 adopted for applying *Catholic Bishop*” because that test “raises the specter of a wide-ranging,
13 constitutionally problematic inquiry into whether a school is ‘sufficiently religious.’” *Brief on*
14 *Behalf of Petitioner SEIU Local 925 and Service Employees International Union as Amicus*
15 *Curiae*, 19-RC-102521 (*Pacific Lutheran University*), filed March 28, 2014.

16 **4. The D.C. Circuit’s “bright line” test is the proper inquiry.**

17 The D.C. Circuit has repeatedly refused to enforce Board decisions asserting jurisdiction
18 based on the “substantial religious character” test. Instead, the D.C. Circuit employs a “bright
19 line” test, exempting an institution from the Board’s jurisdiction if it: (a) holds itself out to
20 students, faculty, and community as providing a religious educational environment; (b) is
21 organized as a nonprofit; and (c) is affiliated with, or owned, operated, or controlled, directly or
22 indirectly, by a recognized religious organization, or with an entity, membership of which is
23 determined, at least in part, with reference to religion. *Univ. of Great Falls*, 278 F.3d at 1343
24 (citations omitted); *Carroll College, Inc.*, 588 F.3d 568. The D.C. Circuit’s bright line test

1 appropriately balances religious-affiliated institutions' First Amendment rights with the Board's
2 statutory responsibility to oversee labor relations. The test "allow[s] the Board to determine
3 whether it has jurisdiction without delving into matters of religious doctrine or motive, and
4 without coercing an educational institution into altering its religious mission to meet regulatory
5 demands." *Univ. of Great Falls*, 278 F.3d at 1345.

6 **5. The Board has no jurisdiction because the University meets the D.C.
7 Circuit's "bright line" test.**

8 The Regional Director's Decision is an example of the impermissible "trolling" that both
9 the Supreme Court and lower courts found repugnant to the Constitution. The Regional Director
10 came to the improbable conclusion that the University "lacks substantial religious character"
11 because the University is financially independent from the Catholic Church and Society of Jesus,
12 there is no religious "litmus" test for faculty and students, the Mission Statement does not refer
13 to the Society of Jesus, Catholicism or Christianity,⁸ "only" a minority of students are Catholic,
14 and undergraduates are required to take "only one class that includes as a component instruction
15 in Catholic theology." *Decision*, at 14.⁹ The Regional Director discounted "the indirect power"
16 of the Provincial over University governance through his ability to remove the President, and
17 makes no mention of the Board of Members' sole authority to amend the Bylaws and Articles of
18 Incorporation, the two governing documents of the University. The Regional Director's
19 selective and crude approach, made pursuant to the substantial religious character test,
20 demonstrates how that test can lead to nonsensical conclusions. Any test that requires the Board
21 to evaluate the degree to which an institution or its employees engage in or perpetuate religious
22 belief and practices is Constitutionally infirm. The D.C. Circuit test in *University of Great Falls*

23 ⁸ Yet, the Decision notes but gives no weight to the Vision Statement's reference to the University's "Jesuit Catholic
24 Inspiration." *Decision*, at 14.

1 avoids this danger and the Board should adopt the D.C. Circuit's approach in this case and all
2 similar cases moving forward.

3 *a. The University holds itself out to students, faculty and the community as providing*
4 *a religious educational environment.*

5 The University's Mission, Vision and Values describe the University as being "dedicated
6 to educating the whole person, to professional formation, and to empowering leaders for a just
7 and humane world." When asked by the Petitioner's counsel if the University's Mission
8 Statement "could" be read as a secular statement, Father Sundborg replied that Catholics and
9 Jesuits would not read the Mission as being secular, noting the Catholic Jesuit meaning of "the
10 whole person" as having a transcendental and spiritual dimension to it. "The University and the
11 faculty know that the whole includes the transcendental and religious dimension, the sacred
12 dimension of the person." *Tr. 152:5-7*. Additionally, the Mission informs the University's
13 Vision that the University "will be the premier independent university of the Northwest in
14 academic quality, Jesuit Catholic inspiration, and service to society," and its Values Statement
15 that reads, in part, "We treasure our Jesuit Catholic ethos and the enrichment from many faiths of
16 our university community." *ER Ex. 6*. The Regional Director disregarded these concepts when
17 issuing his decision, merely noting that the Mission Statement is similar to mission statements of
18 public universities. *Decision, at 3*. Apparently, the Regional Director decided on his own that
19 the University's Mission is secular.

20 The Regional Director also disregarded Goal #1 of the University's "Strategic Plan" for
21 2013-2018: "Strengthen our capacity to provide a high-quality and transformational education
22

23 ⁹ This is incorrect, or misleading. The required UCOR 3100 Core class is a comparative religion class drawing
24 references to Catholicism as a baseline. *Tr. 784:20-22; ER Ex. 38 (UCOR 3100 Course Description)*.

1 rooted in the Jesuit tradition,” *ER Ex. 5*, and the objective that “to promote the Jesuit Catholic
2 character of the University, we will make strategic investments that advance the Jesuit mission,
3 strengthen our understanding of the Catholic tradition, and position the university as a leader in
4 interreligious dialogue.” *ER Ex. 5*.

5 The Regional Director’s Decision made no meaningful reference to the Core when
6 deciding on the religious character of the University. The Core emphasizes philosophy, theology
7 and ethics with specific study on the Catholic Faith. *ER Ex. 38, ER Ex. 37 (identifying Jesuit*
8 *Catholic Intellectual Traditions as the #1 learning objective of the Core); Tr. 1063:16-18*. The
9 student pamphlet identifying the core curriculum requirements clearly conveys the Jesuit
10 influence on education at the University. *ER Ex. 39*. This is noted nowhere in the Decision.

11 The University purposefully recruits, and offers scholarships to students from Catholic
12 high schools. *Tr. 645:1-6*. Yet, the Regional Director concluded that the only significant fact
13 was that only 30 percent of the student body is Catholic. *Decision, at 3*. His decision ignored
14 the rest of Father Sundborg’s testimony that the University’s student body is 30 percent Catholic
15 in a region whose Catholic population is only 10 percent. *Tr. 63:11-13*.

16 The University’s website content clearly communicates the Jesuit Catholic character of
17 the University. *ER Ex. 9 and 9(b); See also ER Ex. 8(b)(announcing the welcoming of Pope*
18 *Francis, a Catholic Heritage Lecture Series, Holy Week Masses, and other Catholic content)*.
19 The University submitted hundreds of pages of exhibits highlighting Catholicism and the Jesuit
20 tradition on the University’s website and in promotional materials. Every Employer witness
21 testified regarding the Catholic Charism on campus and Catholic and Jesuit tangible
22 manifestations of that Charism on campus. The Regional Director did not cite these examples,
23
24

1 other than to highlight two documents—a “brochure” given to incoming students and a student
2 evaluation form—that do not mention “Christianity, Catholicism or God.” *Decision, at 4, 5.*

3 The School of Theology and Ministry and the Campus Division of Mission and Ministry
4 carry out the University’s Mission in different ways. The School of Theology and Ministry
5 provides a place where students and faculty from all religious and spiritual backgrounds can
6 study and collaborate. The Division of Mission and Ministry provides more traditional Catholic
7 teachings and prepares opportunities to become more actively engaged with the Catholic
8 tradition. *Tr. 1421-22.* The University’s distinctive Institute for Catholic Thought and Culture,
9 too, offers faculty fellowships, Catholic lecture series and reading groups that are all specific to
10 the Catholic faith. *ER Ex. 7.* Yet, these did not factor in the Regional Director’s Decision.

11 Religious structures, art and objects permeate the campus. *See ER Ex. 10 (providing a*
12 *listing); ER Ex. 12 (providing detailed listing).* These include the award-winning Chapel of St.
13 Ignatius, crucifixes in classrooms and other religious symbols in and on campus buildings, the
14 presence of Jesuits and other priests on campus, and Arrupe House, the residence for Jesuits on
15 campus. *See, e.g., Tr. 1067-1069; Tr. 1040.* There are extensive opportunities on campus for
16 engaging in the Catholic tradition. *Tr. 240-287; ER Ex. 10.* Dr. Michele Murray, Vice President
17 for Student Development, provided an equally extensive litany of how the Catholic Jesuit
18 character is brought to life for students, including the Jesuits in Residence program in which
19 thirteen Jesuits live in student residences, the undergraduate student learning objectives “rooted
20 in our Jesuit Catholic intellectual and spiritual traditions” (*ER Ex. 17*), the Summer in Seattle
21 student orientation program containing an introduction to Catholic Jesuit educational and
22 spiritual philosophy (*Employer Ex. 23*), student seminars providing opportunities for discernment
23 and self-examination, and the *Student Handbook*, containing the Mission, Vision and Values
24

1 Statements as well as a “How We Educate” section explaining that “[t]he Jesuit educational
2 tradition promotes independent critical thinkers informed by the humanities, open to finding and
3 serving God in all things, and challenged by the Jesuit priority of ‘the service of faith and the
4 promotion of justice....” *Pet. Ex. 59, at 8-9.*

5 The University “unquestionably holds itself out to students, faculty, and the broader
6 community as providing an education that, although primarily secular, is presented in an overtly
7 religious, Catholic environment.” *University of Great Falls*, 278 F.3d at 1345. “Where a school,
8 college, or university holds itself out publicly as a religious institution, ‘we cannot doubt that [it]
9 sincerely holds this view.’” *Id.* at 1344, *quoting Boy Scouts of America v. Dale*, 530 U.S. 640
10 (2000).

11 *b. The University is organized as a not-for-profit educational Institution.*

12 The University is a not-for-profit educational institution. This is not in dispute. *ER Ex.*
13 *1; Decision, at 1 n. 1.*

14 *c. The University is affiliated with, or owned, operated, or controlled, directly or*
15 *indirectly, by a recognized religious organization, or with an entity, membership*
of which is determined, at least in part, with reference to religion.

16 The University is a Catholic Jesuit university. The University’s articles of incorporation
17 state that the University is established “under the auspices of the Society of Jesus.” *ER Ex. 1.* It
18 is registered in the Catholic Directory as a Catholic university, which is required for a university
19 to call itself “Catholic.” *Tr. 46:1-3.* The Board of Members exists, “consistent with the
20 apostolate of the Jesuit community at Seattle University...to assure furtherance of the work of
21 Catholic higher education in accordance with the traditions and ideals of the Society of Jesus.”
22 *ER Ex. 2, at 2-3.* This religious body has the sole authority to amend the Bylaws. *ER Ex. 2.* The
23 University’s President is required to be a Jesuit priest. *Tr. 63:24-25.* The President takes a vow
24

1 of obedience to the Provincial. *Tr. 38:1*. The Jesuit Provincial can remove any University priest,
2 including the President, and the Board of Trustees gains approval from the Provincial before
3 appointing a President. *Tr. 39:10-23*. The President meets monthly with the Seattle Archbishop
4 to keep him abreast of sensitive and other topics at the University. Jesuit priests live in residence
5 halls, there is a Division of Mission and Ministry under the governance of a Jesuit Priest to
6 promote the Catholic and Jesuit identity of the University, the University sponsors religious
7 services (daily and Sunday Mass) and allows Catholic students, faculty and staff to receive
8 sacraments daily. Contrary to the conclusion by the Regional Director, these and other factors
9 are compelling indicia of a religiously-affiliated or controlled institution under *University of*
10 *Great Falls*.

11 During the University's recent accreditation process, the Northwest Commission on
12 Colleges and Universities ("NWCCU") noted the University's strong sense of mission and the
13 fact it was appreciated and understood broadly across the University campus and community.
14 *Tr. 648:9-11*. The NWCCU report stated that "[w]hile Seattle University is 'Catholic and Jesuit
15 in its origin, mission and vision' and while it 'shares with other Catholic traditions a belief in the
16 saving work of Jesus Christ'...it is committed to diversity, free speech, and academic freedom."
17 It continues: "It does not seek to instill a specific belief system, world view or statement of
18 faith...While it may seem like these orientations and commitments have at least the potential for
19 conflicts, ...the institution has been able to walk the fine line required to avoid both compromise
20 of commitment and conflict of values and actions." *Pet. Ex. 5, at 7*.

21 The Regional Director dwelt on only one aspect of the NWCCU report: That the
22 University does not seek to "instill" its world views or statement of faith on others. He failed to
23
24

1 consider the rest of the NWCCU's observation that the University remains committed to its
2 mission and values, both of which are rooted in Catholicism and the Jesuit tradition.

3 In April 2008 Father Sundborg delivered a speech at the Provost's Convocation dedicated
4 to defining the University's distinct Catholic and Jesuit character. *Employer Ex. 71*. In one
5 segment, the speech delineated the essence of the University as "Catholic" and "Jesuit:"

6 ... We are a Catholic university, with our own proper and needed autonomy in order to be
7 a Catholic university. This autonomy is explicitly and officially guaranteed by the
8 Catholic Church. No religious person, whether bishop or provincial, has authority in the
9 internal governance of Seattle University as a Catholic university. Our governance is in
10 our own hands. What is in our hands is being a Catholic university, being truly one,
11 knowing what that means, exploring that truth about ourselves, making it real, living it.

12 The Catholic Church has an official understanding, set of guidelines and norms for being
13 a Catholic university. We need to know and respect them. So important are Catholic
14 universities to the Catholic Church that the title of the official document about them is
15 "From the Heart of the Church."¹⁰ We are not the Church, we are not a church, but we are
16 a university from the heart of the Catholic Church. It matters to the Catholic Church that
17 we are a university, and it matters to us as a university that we are Catholic. This is part
18 of the pursuit of our truth as an institution that we as academic colleagues need to explore
19 and can explore freely with our commitment not only to truth in general but also to our
20 own truth.

21 *Employer Ex. 71, The Catholic Character of Seattle University's Academic Mission:
22 Convening a Conversation*, April 11, 2008, also available to faculty, students and the
23 public at <https://www.seattleu.edu/president/speeches>.

24 **III. THE REGIONAL DIRECTOR MISAPPLIED YESHIVA AND DISREGARDED
BOARD PRECEDENT BY CONCLUDING THE UNIVERSITY'S FULL-TIME
NON-TENURE TRACK FACULTY ARE NOT MANAGERIAL EMPLOYEES**

25 The Regional Director's Decision contains incorrect assertions regarding the facts and
26 holding of *Yeshiva*, and reflects the difficulties the Regional Director has with applying *Yeshiva*
27 to the emerging college and university shared governance model that includes full-time non-
28 tenure track faculty in important decision-making roles. The record is replete with evidence that

29 ¹⁰ *Ex Corde Ecclesiae*, Apostolic Constitution of the Supreme Pontiff John Paul II on Catholic Universities, 15
30 August 1990, available at http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae_en.html.

1 the University's full-time non-tenure track faculty, unlike their part-time counterparts, are active
2 members of the shared governance structure of the University.

3 **A. *Yeshiva* and its progeny.**

4 In *NRLB v. Yeshiva University*, 444 U.S. 672 (1980), the United States Supreme Court
5 considered whether faculty at Yeshiva University were managerial employees who were
6 excluded from coverage under the Act. The court defined managerial employees as those who
7 "formulate and effectuate management policies by expressing and making operative the
8 decisions of their employer." *Id.* at 682. The court stated that "[m]anagerial employees must
9 exercise discretion within, or even independently of, established employer policy and must be
10 aligned with management," and that managerial employees normally "represent management
11 interests by taking or recommending discretionary actions that effectively control or implement
12 employer policy." *Id.* at 683. The court stated that:

13 The controlling consideration in this case is that the faculty of Yeshiva University
14 exercise authority which in any other context unquestionably would be managerial.
15 Their authority in academic matters is absolute. They decide what courses will be
16 offered, when they will be scheduled, and to whom they will be taught. They debate
17 and determine teaching methods, grading policies, and matriculation standards. They
effectively decide which students will be admitted, retained, and graduated. On
occasion their views have determined the size of the student body, the tuition to be
charged, and the location of a school. When one considers the function of a
university, it is difficult to imagine decisions more managerial than these.

18 *Id.* at 686. The court found that the faculty effectively determined the curriculum, grading
19 system, admission and matriculation standards, academic calendars, and course schedules.
20 Further, the Court noted that the faculty's power at Yeshiva extended beyond strictly academic
21 concerns and the faculty made recommendations to the dean concerning hiring, tenure,
22 sabbaticals, terminations, and promotions. The court observed that "these decisions clearly have
23 both managerial and supervisory characteristics." *Id.* at n. 23. While "final" decisions were
24

1 made by a central administration on the advice of the dean of the university, the Court observed
2 that the majority of faculty recommendations were followed. *Id.* at 677. The Supreme Court
3 was clear that “the fact that the administration holds a rarely exercised veto power does not
4 diminish the faculty’s effective power in policy making and implementation...the relevant
5 consideration is effective recommendation or control rather than final authority.” *Id.* at 683, n.
6 17. Based on all of these factors, the Court held that the Yeshiva faculty members exercised
7 managerial functions and were, therefore, excluded from the Act’s coverage.

8 Since the Supreme Court decided *Yeshiva University*, the Board has repeatedly stated that
9 faculty members are managerial employees where they make effective recommendations with
10 regard to course offerings and curriculum. *Lemoyne Owen College*, 345 NLRB 1123 (2005)
11 (faculty at the college were managerial employees because they participated in faculty
12 governance through three entities: the faculty assembly, standing faculty committees, and an
13 academic council; *Yeshiva* and subsequent Board cases are clear that a lack of authority in
14 nonacademic areas is of limited significance in determining managerial status of faculty); *Elmira*
15 *Coll.*, 309 N.L.R.B. 842 (1992)(faculty on curricular affairs committee were managerial where
16 they made recommendations that were always approved by administration); *University of*
17 *Dubuque*, 289 NLRB 349 (1988)(faculty members were managerial because they determined
18 student grading and classroom conduct standards, degree requirements, curriculum content and
19 course offerings); *Boston University*, 281 NLRB No. 115 (1986)(department chairpersons and
20 full-time faculty were managerial employees under *Yeshiva* because they exercised effective
21 control over matriculation requirements, curriculum, academic calendars, and course schedules
22 and had absolute authority over grading, teaching methods, graduation requirements, and student
23 discipline).

1 In *Livingstone College*, 286 NLRB 1308 (1987), the Board determined that the faculty
2 was managerial because they exercised substantial authority with respect to curriculum, degree
3 requirements, course content and selection, graduation requirements, matriculation standards,
4 and scholarship recipients. *Id.* at 1313. Notably, the Board found managerial status even though
5 the faculty had “virtually no input into the budget process, tenure decisions, and setting of tuition
6 and that only the division and department heads have authority in nonacademic matters such as
7 hiring, firing, promotion, and salary increases.” *Id.* at 1314. The Board made a point of saying
8 that “we do not believe that lack of participation in these matters precludes a finding that the
9 faculty are managerial employees.” *Id.*

10 In *Lewis & Clark College*, faculty were found to be managerial because nearly all of their
11 recommendations on academic matters were routinely approved. 300 NLRB 155 (1990).

12 As these cases illustrate, university faculty have been found to be managerial in a myriad
13 of governance models. The faculty’s authority in the academic matters mentioned in *Yeshiva* –
14 the “*Yeshiva* factors” – have become the template for the Board’s analysis of whether faculty are
15 managerial employees. The Board must consider the degree of faculty control over academic
16 matters such as curriculum, course schedules, teaching methods, grading policies, matriculation
17 standards, admission standards, size of the student body, tuition to be charged, and location of
18 the school. *Point Park Univ. v. NLRB*, 457 F.3d 42, 49 (D.C. Cir. 2006). Through analyzing
19 these factors together, “the NLRB must determine whether the faculty in question so controls the
20 academic affairs of the school that their interests are aligned with those of the university or
21 whether they occupy a role more like that of the professional employee in the pyramidal
22 hierarchies of private industries.” *Id.* at 48 (internal citation omitted).

1 **B. The Regional Director disregarded the full-time non-tenure track faculty's effective**
2 **recommendations and control over academic and curricular matters.**

3 The University's full-time tenured, tenure-track and full-time non-tenure track faculty
4 alike share governance duties through participation in the Academic Assembly and in
5 committees within the colleges, schools, and their departments. The Regional Director's hasty
6 and incomplete review of the evidence in this regard, however, led to the wrong result.

7 The Academic Assembly has nineteen seats for various faculty appointments from each
8 school or college, including two full-time non-tenure track faculty appointments. *Tr. 351:25;*
9 *352:1-2; See also ER Ex. 34 at 2.* Part-time non-tenure track faculty are not allowed on the
10 Academic Assembly. *Tr. 369:6-9.* The scope and role of the Academic Assembly is to "help
11 lead the University forward" by making dozens of recommendations to University administration
12 throughout the year. *Tr. 413:15; 416:23.* It focuses primarily on issues of the academic
13 enterprise, including curriculum, academic programs, and matters pertaining to faculty. For
14 example, the Academic Assembly recently considered proposals for a new "Web Development"
15 certificate program and a "Business and Legal Studies" program. *ER Ex. 75, November 4, 2013*
16 *and January 27, 2014 minutes.* It is also concerned with matters related to enrollment,
17 University finances, and other issues relevant to the operation of the University to carry out its
18 Mission in the areas of teaching and research. *Tr. 413:14-21.* The Academic Assembly
19 considers issues relating to course instruction, research, scholarship, academic policies,
20 interaction with students, and the extent to which students are able to gain entry into, and
21 matriculate through, degree programs. *Tr. 414:11-19.* The University leadership seeks approval
22 from the Assembly concerning faculty-related policies. *Tr. 415:11-13.* For example, the
23 Academic Assembly was consulted for its approval and endorsement concerning faculty
24

1 appointments and titles. *Tr. 414:11-19; ER Ex. 15.* Academic Assembly approval is also sought
2 for any major changes or revisions to the University's Core Curriculum. *ER Ex. 75, November 4,*
3 *2013 minutes.*

4 The Academic Assembly, through its Program Review Committee, must also, on a
5 cyclical basis, review all of the University's academic programs. The Academic Assembly must
6 review and approve any new program that comes forward or any existing program that is
7 substantially revised. *Tr. 423:5-14.* For example, new academic programs are created when a
8 college or school¹¹ brings forward a proposal for new academic programs generated from the
9 faculty within them, perhaps from an internal department. *Tr. 416:24-25, 417:1-9; 420.* The
10 college or school brings the proposal to the Academic Assembly for its consideration. The
11 Academic Assembly considers it and makes a recommendation to the office of the Provost.
12 From there, the proposal is considered by the President and the Board of Trustees. *Tr. 416:24-*
13 *25, 417:1-9.* This procedure is followed in all aspects of academic development, such as reviews
14 of academic programs and their continuation to proposals for new programs to changes in
15 policies and procedures. *Tr. 419:7-9.* The Provost testified that in his six years of service, he
16 could recall only one instance where a recommendation of the Academic Assembly was not
17 approved.¹² *Tr. 416:24-25, 417:23-25, 418:1-2.* In fact, when asked whether the University
18 President, the Board of Trustees or the Provost could disregard a faculty recommendation if they
19 did not agree with it, Dr. Crawford responded: "At one's own peril." *Tr. 702:24.* In other
20 words, the Academic Assembly exercises effective control at the University on matters of
21 curriculum and other academic matters. *Lewis & Clark College, supra.*

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23
24 ¹¹ Often through a designated "Curriculum Committee."

1 Within each of the eight colleges and schools at the University,¹³ there is a shared
2 governance structure, either through faculty meetings or different types of committee structures,
3 that weighs and contends with issues relating to curriculum, scholarship research, faculty review,
4 appraisal, promotion, tenure, among other things. *Tr. 413:6-11*. For example, the College of
5 Arts and Sciences has an internal Executive Committee consisting of approximately two dozen
6 members that discusses curriculum and other College concerns. *ER Ex. 63 and 64*. The dean of
7 each college or school acts as its chief academic officer and administers policies and procedures
8 for each of the colleges. *Tr. 305:10-13*.

9 Full-time non-tenure track faculty are required to carry out service responsibilities in their
10 programs, departments, colleges, schools, or at the university level. *Tr. 344, 349:21-25; 352:18-*
11 *22; 366:10-13*. Service can take many forms, from serving on committees to mentorship of
12 students to assisting with commencement activities. *Tr. 352:24-25; 353:1-3*. Adjunct, or part-
13 time, faculty members are hired to teach on a per-course basis to fill important needs within the
14 colleges and schools within their instructional faculty. *Tr. 366:22-24*.

15 As in *Yeshiva*, the full-time non-tenure track faculty at the University exercise significant
16 authority over the University's curriculum and course offerings. One of the faculty's central
17 roles is oversight and responsibility for the creation, maintenance and implementation of
18 curriculum. *Tr. 419:15-17*. Full-time tenured, tenure-track and full-time non-tenure track
19 faculty are totally responsible for the creation of new courses, new academic programs,
20 assessment of existing programs, and development of individual course content, including
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22 ¹² In that instance, however, Dr. Crawford followed the recommendation of the faculty of the specific college that
submitted the proposal and the Program Review Committee of the Academic Assembly. *Tr. 418 (regarding*
elimination of German minor degree).

23 ¹³ The College of Arts and Sciences, the Albers School of Business and Economics, the College of Education, the
24 School of Law, the Matteo Ricci College, the College of Nursing, the College of Science and Engineering, and the
School of Theology and Ministry. *Tr. 304:25; 305:1-6*.

1 syllabus creation. *Tr. 421:2-3; 426:6-16.* Decisions concerning individual courses and course
2 content are determined by faculty at the college/school level. *Tr. 421:23-25.* One dean who
3 testified stated that even in instances when he is technically allowed to overrule faculty
4 recommendations concerning curriculum, he does not consider such an action to be practical and
5 would instead seek faculty consensus. *Tr. 1438, 1141.*

6 Full-time non-tenure track faculty are members of the Core Curriculum Committee,
7 which is the body that has input and oversight of the administration of the University's Core
8 Curriculum. *Tr. 630:14-19.* The Core Revision and Implementation Committees composed of
9 faculty members who included full-time non-tenure track faculty persons, determine all aspects
10 concerning application of the Core Curriculum at the University. *Tr. 779.*

11 One important example of the faculty's effective control over academic standards was its
12 role in developing and approving the Academic Strategic Action Plan of the University for the
13 period 2009 to 2014. *ER Ex. 29.* This plan set the course for the University's future academic
14 enterprise and was developed through a broad collaborative process across the University with
15 input from faculty, staff, and students. *Tr. 598.* The Academic Strategic Action Plan was
16 submitted to the Academic Assembly for its approval, and the Academic Assembly made
17 suggestions for revisions on more than one occasion. *Tr. 599.* These examples demonstrate that
18 full-time faculty are managerial because they exercise effective control over curriculum and
19 course offerings. *Lemoyne Owen College, supra; Livingstone College, supra.*

20 The University's full-time non-tenure track faculty control teaching methods, *i.e.*, the
21 manner in which a faculty member presents a course. *Tr. 424:5-7; 14-25.* Each faculty member
22 has the right and authority to determine the best method to meet the learning outcomes
23 associated with any individual course or curriculum of study. At the same time, each college or
24

1 school then has the overarching responsibility to determine its standards and expectations for
2 teaching methods for courses offered out of its college or school. *Tr. 424:14-20.*

3 The University's full-time non-tenure track faculty have effective input in the grading
4 systems and policies within their departments, colleges and schools. Faculty, with contribution
5 from program directors, chairpersons, and deans within the colleges and schools, are primarily
6 tasked with shaping grading policies. *Tr. 425:1-7.* The Academic Assembly and the Provost¹⁴
7 also oversee such policies to ensure that they are within the general framework of the
8 University's expectations. *Tr. 425:1-7.* Individual faculty have full responsibility for grading
9 students pursuant to grading policies established by faculty. *See, e.g., Tr. 1040:9-13.*

10 Full-time and part-time non-tenure track faculty control classroom standards and conduct.
11 *Tr. 427:1-7.* The faculty person who is teaching the course has control over the enforcement of
12 rules of student decorum and behavior in the classroom. *Id.*

13 Full-time non-tenure track faculty indirectly control admission and matriculation
14 standards and policies. Both admission and matriculation standards were developed in
15 collaboration with the faculty broadly and approved by the Academic Assembly. *Tr. 427:9-14;*
16 *428:4-9.* Policies such as the general size of the student body have been discussed within the
17 Academic Assembly. *Tr. 596:20-25; 597.* If there was a proposal for change to matriculation
18 standards, the Academic Assembly would need to consider and approve it. *Tr. 596:4-7.*

19 While the Academic Assembly does not have direct input concerning the hiring,
20 promotion, or tenure of individual faculty members (that occurs at the school/college and/or
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23 ¹⁴ Dr. Crawford testified, however, that he has never actually had to involve himself with grading policies. *Tr.*
24 *425:10-12 (Crawford).*

1 department level), the Academic Assembly does have input in setting standards for such actions
2 through its development of the Faculty Handbook. *Tr. 699-700.* Faculty committee
3 recommendations on these topics are respected. For example, a faculty committee
4 recommendation for hiring new faculty at the University has not been overruled during Dr.
5 Crawford's time at the University. *Tr. 703-05.*

6 As in *Yeshiva*, the University's full-time non-tenure track faculty's authority extends
7 outside of the academic sphere into other areas. For example, a full-time non-tenure track
8 faculty member has chaired the University's Athletic Advisory Board. *Tr. 629:19-25.* A full-
9 time non-tenure track faculty member has served as the University's faculty athletic
10 representative, which is a position mandated by the NCAA. *Tr. 630.* When the faculty does not
11 have direct authority over a non-academic concern, such as benefits eligibility, they have used
12 the Academic Assembly to raise issues concerning such areas in order to promote change. *Tr.*
13 *704-705.* Full-time non-tenure track faculty are also expected to provide service to the
14 University, which can be provided on a myriad of committees, in addition to teaching
15 responsibilities. *Tr. 352-53, 335:16-23.* Non-tenure track faculty have been members of search
16 committees for qualified applicants for employment, the Agency Equity Committee, the
17 Technology Task Force Committee, the Women's Studies Advisory Board, the Summer
18 Research Grant Award Committee, and many other managing committees and boards. *Tr. 630-*
19 *633.*

20 Many full-time non-tenure track faculty serve as Deans, Assistant and Associate Deans in
21 the schools and colleges, an option not available to part-time faculty. *Tr. 398:22-25.*

22 Despite these facts, the clear language of *Yeshiva*, and Board precedent, the Regional
23 Director concluded, incorrectly, that the University's non-tenure track faculty are not managerial.
24

1 He recognizes that, at the University, “contingent faculty can determine the content of their
2 courses, evaluate their students, and supervise their own research.” But, “[a]ccording to the
3 [*Yeshiva*] Court, none of that makes them managers.” *Decision*, at 15, *citing Yeshiva*, 444 U.S.
4 at 682. The Court came to no such conclusion. Rather, the Court, in a footnote, stated that these
5 factors are starting points and that managerial status is not found “merely” because they meet
6 these criteria. 444 U.S. at 690 n. 31.

7 Though the Regional Director acknowledges that the Academic Assembly “has some
8 power found to be managerial in *Yeshiva*—authority over curriculum, grading policies, and
9 matriculation standards,” he dismisses this authority because tenure and tenure-track faculty are
10 a majority on the Assembly. *Decision*, at 15. To support this proposition, the Regional Director
11 cites the Board’s original *University of Great Falls* decision, 325 NLRB 83 (1997), in which the
12 Board found no faculty authority through committees in which *faculty* were in the minority and
13 *non-faculty* were in the majority. 325 NLRB at 95. Here, the Academic Assembly voting
14 members are *all faculty*, who share the same academic freedom, and who have equal voting
15 rights with the exception of matters pertaining to tenure. By differentiating between
16 tenure/tenure-track and non-tenure track faculty voting members of the Academic Assembly, the
17 Regional Director has created a new rule that non-tenure track faculty will never have
18 managerial authority under *Yeshiva*. *Decision*, at 15. He states that he is “unaware of any
19 case...in which the Board found that contingent faculty, as distinct from tenure-track faculty,
20 were managers.” The Regional Director need look no further than *Yeshiva* itself, in which the
21 full-time faculty whom the Court held to be managerial included faculty holding the titles of
22 Adjuncts and Instructors. *Yeshiva Univ.*, 231 NLRB 597, 599 (1977), *enforcement denied*,
23 *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980). There are many other cases in which the Board
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1 found non-tenured faculty to be managerial under *Yeshiva*. See, e.g., *Univ. of Dubuque*, 289
2 NLRB 349, 353 (Junior, untenured faculty should be no treated differently from senior faculty
3 under *Yeshiva*); *Livingstone College*, 286 NLRB 1308, 1312 (1986)(Full-time faculty, including
4 only three with tenure, who have no control over tenure decisions, are managerial); *Boston*
5 *University*, 281 NLRB 798, 859-60 (Untenured junior faculty share same managerial attributes
6 as their older, tenured colleagues); *Univ. of New Haven*, 267 NLRB 939 (1983)(Unit of full-time
7 faculty including non-tenured faculty was managerial).¹⁵ The Board should revisit the Regional
8 Director’s Decision in this regard. Moreover, the Regional Director errs by disregarding Board
9 precedent finding minority faculty representation to reflect managerial authority, as occurred in
10 *University of Dubuque*, in which the Board cited minority faculty representation as evidence of
11 managerial authority where, as here, faculty had the authority to set student grading and
12 classroom conduct standards, set degree and degree-related requirements, and develop,
13 recommend and approve curricular content and course offerings. *Univ. of Dubuque, supra*.

14 The cases cited above show that effective authority in matters of curriculum and course
15 offerings—and not “tenure” status—are of supreme importance under *Yeshiva* because faculty
16 that has control over the academic affairs of the school have interests that are aligned with those
17 of the university. Also, a finding of managerial status will not be defeated simply because
18 faculty decision-making is subject to the approval and/or veto power of the administration.
19 *Yeshiva*, at 683, n.17; *University of Dubuque, supra*; *Livingstone College*, 286 NLRB 1308
20 (1987); *American Int’l College*, 282 NLRB 189, 202 (1986).

21
22 ¹⁵ A further indication that the Regional Director considers tenure status to be the critical dividing line between
23 managerial and employee status is his unsupported conclusion that “tenure-eligible faculty have a stake in
24 participation in University governance” by virtue of their tenured/tenure-track status, whereas non-tenure track
faculty have no such stake. *Decision*, at 15. This flies in the face of exhibits and testimony describing the
stakeholder role of full-time non-tenure track faculty in the shared governance model. See, e.g., *ER Ex. 3 (Faculty Handbook)*; *Tr.* 598-599.

1 Based on this evidence, the Regional Director concedes that the Academic Assembly has
2 control over academic matters including curricula and program requirements and meets some of
3 the *Yeshiva* factors. *Decision*, at 15. Yet, because the full-time employees at issue are not
4 tenure-eligible, the Regional Director discounts that control. This turns *Yeshiva* and later Board
5 cases on their heads. The Board should review and reverse the Decision because of this
6 deviation from established precedent.

7 **IV. THE REGIONAL DIRECTOR'S FINDING THAT THE PROPOSED UNIT IS**
8 **"APPROPRIATE" DISREGARDS ESTABLISHED LAW REGARDING**
9 **COMMUNITY OF INTEREST AS WELL AS *SPECIALTY HEALTHCARE***

10 The Regional Director has placed within the same unit faculty who have different
11 compensation structures, receive different benefits, have different service commitments and who
12 have markedly different terms of engagement with the University's shared governance model. In
13 so holding, the Regional Director omits material facts and misstates the record regarding
14 employee interchange. In addition, in excluding faculty from the College of Nursing and School
15 of Law, the Regional Director discounts the very same factors he relied upon to include faculty
16 in other schools and colleges. His unit decision is inherently contradictory and illogical under
17 Board law, including *Specialty Healthcare*, and warrants Board review.

18 **A. The established legal standard regarding "community of interest."**

19 For a unit to be "appropriate" under Section 9(b) of the Act, the Board's "focus is on
20 whether the employees share a 'community of interest.'" *Specialty Healthcare*, 357 NLRB No.
21 83, at 9 (2011). The Board examines the following eight factors:

22 [W]hether the employees are organized into a separate department; have distinct skills
23 and training; have distinct job functions and perform distinct work, including inquiry
24 into the amount and type of job overlap between classifications; are functionally
integrated with the Employer's other employees; have frequent contact with other
employees; interchange with other employees; have distinct terms and conditions of
employment; and are separately supervised.

1 *Id.* at 40-41 (quoting *United Operations Inc.*, 338 NLRB 123, 123 (2002)); *See also Kalamazoo*
2 *Paper Box Corp.*, 136 NLRB 134, 137 (1962). The community of interest test “focuses almost
3 exclusively on how the employer has chosen to structure its workplace.” *Id.*

4 The Board follows the general rule that part-time faculty members do not share a
5 community of interest with other faculty. In *New York University*, 205 NLRB 4 (1973), the
6 Board held that a combined unit of full-time and part-time faculty was inappropriate because the
7 part-time faculty were not eligible for tenure, had different work responsibilities and conditions,
8 did not receive the same type of compensation or benefits, and were excluded from most
9 university governance groups. *See also Univ. of San Francisco*, 265 NLRB 1221 (1982) (stating
10 that combined unit of part-time and full-time faculty is inappropriate but holding that a unit of
11 part-time faculty members who share a community of interest is appropriate); *Goddard College*,
12 216 NLRB 457 (1975) (part-time faculty did not even have a sufficient community of interest to
13 warrant their own unit); *Catholic Univ. of America*, 205 NLRB 130 (1973) (part-time faculty at
14 law school excluded under *New York University*).

15 The Regional Director made much of *New York University* relying, in part, on the tenure
16 status of the full-time faculty in that case. Yet, such status was only one of the four factors listed
17 by the Board as bases for excluding part-time faculty. The other three factors—differences in
18 compensation, participation in university governance, and working conditions—are all present in
19 the instant case. By focusing solely on the tenure status of the faculty in *New York University* to
20 the exclusion of the other three factors, the Regional Director is putting forth a *per se* rule that
21 the *New York University* holding will never apply to unit determinations involving full-time and
22 part-time non-tenure track faculty.

1 The Regional Director ignored other Board law that would have led him to conclude that
2 the part-time faculty at the University do not share a community of interest with their full-time
3 colleagues. In *Kendall College v. NLRB*, the Board approved of a unit consisting of full-time
4 faculty and part-time faculty employed on the basis of pro-rated full-time contracts. It excluded
5 other part-time faculty who were paid on a per course basis. *Kendall College*, 229 NLRB 1083
6 (1977), *enf'd*, *Kendall College v. NLRB*, 570 F.2d 216 (1978). In enforcing the Board's
7 bargaining order, the Seventh Circuit agreed with the Regional Director that there were
8 "significant" differences between the part-time faculty who were paid on the basis of pro-rated
9 full-time contracts and those who were paid on a per course basis. 570 F.2d 216 (1978). The
10 former received salaries under contracts identical to full-time faculty, were required to attend
11 Faculty Senate meetings and serve on committees, and received fringe benefits. In contrast, part-
12 time per course faculty were paid differently, were not expected to attend Faculty Senate
13 meetings, could not avail themselves of most fringe benefits, and often held jobs elsewhere. The
14 Regional Director in *Kendall College* noted that the interests and duties of per course part-time
15 faculty members were generally limited to teaching and grading whereas the pro-rated part-time
16 faculty had "more substantial ties to the college." The Court concluded that this was substantial
17 evidence supporting the Board's determination that the per course part-time faculty should be
18 excluded from the unit. *Id.* These facts are virtually identical to those in the present case, and
19 the Regional Director here should have made the same differentiation between the non-tenure
20 track faculty in this case. The unit is not appropriate for this reason.

1 **1. The facts and law required the Regional Director to find that full-time non-**
2 **tenure track faculty and part-time non-tenure track faculty lack a**
3 **community of interest.**

4 The Regional Director concluded that there was a community of interest among full-time
5 and part-time non-tenure track faculty despite overwhelming evidence of material differences
6 between these individuals relating to wages, benefits and their terms and conditions of
7 employment. In addition, because of the full-time non-tenure track faculty's role in the
8 University's shared governance model, their inclusion in a unit of part-time faculty requires a
9 finding that the proposed unit is not an appropriate unit for collective bargaining purposes.
10 Astonishingly, the Decision also states that "[m]any university governance opportunities are
11 closed to most non-tenure track faculty." *Decision*, at 18. This is patently incorrect and
12 dismissive of the voluminous record proving otherwise.

13 Full-time non-tenure track faculty must provide service to his or her academic area or the
14 University in addition to his or her teaching responsibilities. The Faculty Handbook states that
15 full-time faculty members must attend general and departmental faculty meetings, be available to
16 act as an academic advisor, serve on University committees, participate in academic planning,
17 and participate in shared governance of the University. *ER Ex. 3, Section 9.2.3*. By virtue of this
18 expectation, full-time non-tenure track faculty hold positions on the Academic Assembly,
19 Curriculum Committee, the Council of Associate Deans, the Strategic Planning Council, and the
20 Program Review Committee. *ER Ex. 32*.

21 The Regional Director overlooked the absence of a service expectation for part-time non-
22 tenure track faculty. *Tr. 353:8-9; Tr. 1419:6-10*. The uncontroverted evidence is that all full-
23 time faculty are expected to provide service (which is done primarily through committee work)
24 and are evaluated on that commitment. Part-time non-tenure track faculty generally do not sit on

1 committees. For example, while full-time non-tenure track faculty are voting members of the
2 Academic Assembly, part-time non-tenure track faculty do not hold seats on the Academic
3 Assembly. *Tr.* 369:5-19. The University provided examples of other committees in which full-
4 time faculty held seats. *See, e.g., ER Ex. 81 (identifying Albers School committee assignments);*
5 *Tr.* 1415-16 (*School of Theology and Ministry curriculum and formation committees*). There
6 was testimony that full-time non-tenure track faculty “are involved in the broader life of the
7 university” because they are expected to participate in committees. *Tr.* 1420-21. All of the
8 University’s witnesses confirmed the broad engagement of full-time faculty in the shared
9 governance model and a corresponding lack of meaningful part-time faculty involvement.

10 **2. The Regional Director misrepresented the evidence regarding the lack of**
11 **faculty interchange.**

12 The record shows that during the past ten years, the University has employed more than
13 2,000 non-tenure track faculty. Of this amount, only 126 faculty have held positions of both full-
14 time and part-time faculty. Of the 126, 107 moved from part-time status to full-time status and
15 stayed there. *Tr.* 1360-62. In short, 6.3 percent of the faculty moved from one status to the other
16 in the past ten years, and most of that group moved from part-time to full-time status without
17 going back. Despite this, the Regional Director relied on the testimony of two of the Petitioner’s
18 witnesses who testified that “they were aware” of (though they did not identify) people who
19 made the transitions in both directions. To the Regional Director, this amounted to “substantial
20 evidence of contingent faculty moving from part-time to full-time and vice-versa, *Decision*, at
21 10, and “significant interchange among the types of contingent faculty,” *Decision* at 18. It is
22 unfathomable how the Regional Director could come to this conclusion based on the facts. It
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24

1 also contradicted his previous finding that there is no evidence of temporary interchange.

2 *Decision*, at 10.

3 In recent years, the University has deliberately increased the number of full-time faculty,
4 including non-tenure track, to improve its programs and the quality of its education. As a result,
5 the number of part-time faculty teaching in the Core Curriculum, for example, has decreased
6 from approximately 25 percent to 15 percent. *Tr.* 818. For the Regional Director to assert that
7 interchange amongst the proposed unit members is frequent or meaningful distorts the factual
8 record.

9 **3. Full-time and part-time non-tenure track faculty have different**
10 **compensation structures, benefits and working conditions.**

11 Full- and part-time faculty appointments have compensation structures, benefits and
12 working conditions much like the categories of employees described in *Kendall College, supra*.
13 Compensation for tenured, tenure-track, and full-time non-tenure track positions differ from
14 compensation for part-time non-tenure track positions. Tenured, tenure-track, and full-time non-
15 tenure track faculty are paid on a salary, established by contract. *Tr.* 388. Full-time non-tenure
16 track salaries range from \$42,000 to \$149,085. *ER Ex.* 42. In contrast, part-time non-tenure
17 track faculty are paid per course. *Tr.* 390:13-21. There is no uniform pay scheme for part-time,
18 non-tenured track faculty that applies across all colleges and schools, though they are paid
19 between \$3,000 and \$7,000 per course. *Tr.* 391; *ER Ex.* 36. Furthermore, the University
20 recently implemented market equity programs for its tenured, tenure-track, and full-time non-
21 tenure track faculty to raise their compensation over a period of years but did not change the
22 part-time compensation program. *Tr.* 392-395.

1 The timing of faculty appointments also differs between full- and part-time non-tenure
2 track faculty. Full-time non-tenure track faculty generally receive their appointments on an
3 annual basis at the same time that tenure and tenure-track faculty receive their contracts. *Tr.*
4 *389:1-5*. Part-time non-tenure track faculty generally receive their contracts in the months after
5 tenured, tenure-track, and full-time non-tenure track faculty receive theirs, once the need for
6 part-time faculty is truly established. In the current academic year, 41 full-time non-tenure track
7 faculty have multiple year contracts. No part-time non-tenure track faculty have multiple year
8 contracts. *Tr. 390*.

9 Benefits eligibility also differs between full- and part-time non-tenure track faculty. All
10 full-time non-tenure track faculty receive benefits through the University; these are the same
11 benefits that are made available to any tenured or tenure-track faculty. *Tr. 353:15-21*. Part-time
12 non-tenure track faculty are only eligible if they teach the equivalent of four courses per year. *Tr.*
13 *368:12-14; Tr. 1032*. Only 48 of 223 part-time faculty currently receive University benefits
14 whereas all full-time faculty receive these benefits. *Tr. 369:2*.

15 Delivery of performance evaluations is another way in which full- and part-time tenure
16 track faculty are distinguished. *ER Ex. 15*. Tenured, tenure-track, and full-time non-tenure track
17 faculty receive formal evaluations annually by their deans or department chairs. Part-time non-
18 tenure track faculty receive student evaluations on a quarterly basis and a small percentage of
19 this group receive limited formal evaluations. *Tr. 350:20-25, 351:1; 673-74; ER Ex. 3, Section*
20 *2.3, 5.2*. The Regional Director, however, found that all evaluations are informal. The
21 Petitioner's own evidence shows otherwise. Two of its witnesses described their informal
22 evaluations, consisting primarily of student evaluations, while serving as *part-time* faculty. *Tr.*
23 *1044*. One of these witnesses then described his evaluation when he became full-time, which
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1 consisted of a written evaluation from his department chair in addition to student evaluations.
2 *Tr. 976.* Another witness, Dr. Jerome Veith, a full-time faculty member throughout, always
3 received a more formal evaluation in which the Department Chair provided written feedback and
4 consultation on areas of improvement. *Tr. 1112:1-5.* It is incorrect to assert that these are all
5 “informal” evaluations. The Petitioner’s own witnesses confirm that there are substantive
6 differences in evaluation format and procedure between full- and part-time faculty.

7 The hiring process for full-time faculty is more formal than for part-time faculty. Two
8 of the three faculty witnesses for the Petitioner described the information hiring process related
9 to their part-time positions. *Tr. 1026-1027; Tr. 948-49.* The third witness, Dr. Veith, was hired
10 on as a full-time faculty member, and described a more formal process in which he was
11 interviewed by three tenure-track faculty and was required to submit references and other written
12 materials. *Tr. 1091-1092.* Despite this clear testimony, the Regional Director concluded that
13 “hiring of contingent faculty is fairly informal” and described the process as it related to *part-*
14 *time faculty* as described by the Petitioner’s two witnesses. *Decision*, at 9. This is an incorrect
15 conclusion.

16 Full-time non-tenure track faculty are eligible to receive professional faculty
17 development funds that are not available to part-time faculty. *ER Ex. 33.* The Regional Director
18 was unimpressed because “none of the contingent faculty witnesses testified to receiving any
19 such funds.” *Decision*, at 10. Of course, there is no evidence that these witnesses ever applied
20 for such funds, and in any event it is flawed logic to dismiss this faculty benefit and differentiator
21 on such a thin reed. Finally, more full-time non-tenure track faculty have offices than part-time
22 non-tenure track, despite there being approximately twice the number of part-time faculty.

1 Typically, part-time faculty share office space with each other, which is less common for full-
2 time non-tenure track faculty. *Tr. 942:24-25.*

3 This analysis of the “community of interest” factors shows that there are many more
4 differences – and significant differences at that – than there are similarities amongst the members
5 of the proposed unit. Any common ground that occurs is solely the result of the fact that at a
6 University there is only one product: the education of a student. As a result, there is some
7 coordination and overlap. However, it is quite another thing to exalt, as do the Petitioner and
8 Regional Director, this minimal overlap into a shared community of interest where every
9 employee in the proposed unit shares a community of interest with every other employee. Much
10 more is required to find “community of interest” under Board law. Accordingly, the proposed
11 unit is inappropriate because the proposed members do not share a sufficient community of
12 interest.

13 **B. The Regional Director misapplied *Specialty Healthcare* when he excluded the**
14 **faculties from the College of Nursing and School of Law.**

15 It is well settled that a petitioner cannot seek to represent an “arbitrary segment” of an
16 otherwise appropriate unit. *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999). The Board will
17 expand the bargaining unit if “there is no legitimate basis upon which to exclude” the excluded
18 employees from the unit. *Specialty Healthcare*, 357 NLRB No. 83, at 12-13 (2011). A
19 petitioner cannot fracture a unit, seeking representation in “an arbitrary segment” of what would
20 be an appropriate unit. *Id.* The Board will not approve units consisting of combinations of
21 employees that are too narrow in scope or that have no rational basis. *Id.*; *Harvard College*, 269
22 NLRB 821, 823, 824 (1984)(unit of clerical and technical employees of a “Medical Area” not
23 appropriate; employees who shared same salary schedule, benefits and job classifications did not
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1 share a “special community of interest” because other University employees shared same work
2 factors, skills and functions).

3 In *Odwalla, Inc.*, 357 NLRB No. 132 (2011), the Board considered this issue in the
4 context of the union’s proposal to include route sales drivers who delivered the employer’s juice
5 products to retailers, warehouse employees who worked in the employer’s warehouse,
6 mechanics, and other classifications, but not to include product “merchandisers” who, like the
7 route sales drivers, worked primarily in stores maintaining and arranging the products. In
8 finding an overwhelming community of interest between merchandisers and the rest of the unit,
9 the Board stated: “Here, none of the Board’s traditional community-of-interest factors suggests
10 that all the employees in the recommended unit share a community of interest that the
11 merchandisers do not equally share....” *Id.* at 22. The Board emphasized that the unit sought
12 by the union did not match any administrative grouping of the employer, such as a grouping
13 organized by department or a line of supervision, and that the merchandisers shared immediate
14 supervision with those in the proposed unit. *Id.* at 22-25. The Board held that the work location
15 was not significant enough to provide a meaningful distinction because even the members of the
16 proposed unit worked in various locations. *Id.* at 27. It noted that the merchandisers alone
17 would have constituted an appropriate unit. However, its conclusion rested on a finding that no
18 rational basis existed that supported drawing the line between the union’s proposed inclusions
19 and exclusions. To exclude the merchandisers while including employees who did not share
20 common supervision and overlapping duties would fracture the unit. *Id.* at 30; *see also Wheeling*
21 *Island Gaming, Inc.*, 355 NLRB No. 127 (2010)(NLRB refused to approve a unit limited to
22 poker dealers where they did not have a community of interest separate and distinct from craps,
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1 roulette, or blackjack dealers, finding they were all casino gaming employees, just for different
2 games).

3 Here, as reflected in the record, the Regional Director should have expanded the
4 proposed bargaining unit because of the significant integration of policies, practices and
5 functions among the excluded employees and the rest of the petitioned-for bargaining unit.
6 There is “no legitimate basis” upon which to exclude faculty from the College of Nursing and
7 School of Law. Applying the *Specialty Healthcare* framework here, and assuming the faculty in
8 the proposed unit share a community of interest, faculty in these two areas likewise share a
9 community of interest with the employees included in the proposed unit. The part-time faculty
10 in the College of Nursing and School of Law share as much “community of interest” with the
11 members of the proposed unit as the members of the proposed unit do with each other. As in
12 *Odwalla*, the Union seeks to represent employees who share little, if any, community of interests
13 and in fact differ in many respects. In these circumstances, the Board must determine whether
14 the interests of excluded employees sufficiently overlap with the interests of the included
15 employees. See *Odwalla, Inc.*, 357 NLRB No. 132 at 19-21.

16 The College of Nursing and School of Law cannot be characterized as isolated, stand-
17 alone entities. The faculties of both entities are subject to the same compensation structure as the
18 other faculty. They are subject to the same employee benefits and eligibility rules as other
19 faculty. *Tr. 1451:3-5*. The faculty in the School of Law teach in several interdisciplinary, or
20 cross-college, programs with other schools and colleges. There are joint degree programs
21 conferring *Juris Doctor* degrees in conjunction with MBA (Albers), Criminal Justice (Arts and
22 Sciences), Transformational Leadership (STM), and baccalaureate business (Albers) degrees.
23 *Tr. 318:1-7*. Full-time faculty at the College of Nursing and School of Law serve on a variety of
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1 committees and task forces around the University and on the Academic Assembly and have the
2 same access to the same benefits and amenities as all other full- and part-time faculty members.
3 Several schools and colleges have their own handbooks in addition to these two schools. *See,*
4 *e.g., ER Ex. 46 (College of Education Adjunct Faculty Handbook); ER Ex. 47 (College of*
5 *Science and Engineering Faculty Handbook); ER Ex. 48 (School of Theology and Ministry*
6 *Faculty Handbook); ER 51 (College of Arts and Sciences Faculty Policies).* The *Faculty*
7 *Handbook, ER Ex. 3,* applies to all faculty in all schools and colleges, including Nursing and
8 Law.

9 The fact that the College of Nursing has an additional teaching location is not
10 determinative. The College of Nursing has a main building on campus and a secondary off-
11 campus location at Swedish's Cherry Hill Campus where full- and part-time non-tenure track
12 faculty teach nursing students. *Tr. 679.* At the same time, full- and part-time non-tenure track
13 faculty of the Albers School of Business and the College of Education, whom the Union has
14 submitted for inclusion in the proposed unit, teach at the University's Eastside Campus location
15 in Bellevue, Washington. *Tr. 681.* College of Education faculty also work with students in
16 clinical environments in multiple locations in the Seattle School District and in various suburbs.
17 *Tr. 683.* Full- and part-time non-tenure track faculty of the School of Theology and Ministry,
18 whom the Union has submitted for inclusion in the proposed unit, teach at several off-campus
19 locations. *Tr. 681-82.* Accordingly, the Union cannot logically distinguish the College of
20 Nursing faculties from those submitted for inclusion in the bargaining unit on the basis that they
21 work at "off-campus" locations. For unknown reasons, the Regional Director's Decision does
22 not address these similarities.

1 The Regional Director also attempts to differentiate College of Nursing faculty based on
2 their hours of work, which may involve Summer work and work in evenings and nights. He fails
3 to take into account that the University has a Summer session that involves other, non-Nursing
4 Faculty. Also, faculty in the School of Theology and Ministry, College of Arts and Sciences,
5 and College of Science and Engineering teach evenings and nights as well. Tr. 675-676; 690:10-
6 13.

7 Both the College of Nursing and School of Law require accreditation by outside
8 associations. This does not distinguish them from the other colleges and schools of the
9 University. The University confers many graduate and undergraduate degrees in the College of
10 Arts and Sciences, the Albers School of Business and Economics, the College of Education, the
11 School of Law, the College of Nursing, the College of Science and Engineering, and the School
12 of Theology and Ministry that require accreditation by an external organization or entity that set
13 their own standards. Tr. 314:18-22. The University maintains “dozens of accreditations for
14 academic programs across the colleges and schools.” Tr. 319:20-21; See also ER Ex. 76; ER Ex.
15 73; ER Ex. 74; Tr. 320:16-17 (*evidence identifying different accreditation standards across the*
16 *University*). Accordingly, neither the College of Nursing nor the School of Law is unique in this
17 regard. Finally, any contention that the College of Nursing and School of Law faculty are
18 sufficiently distinct because they teach a specialized subject matter is no different than the
19 rejected position that poker dealers were sufficiently distinct from other employees overseeing
20 other casino games in *Wheeling Island Gaming, Inc.* The Union cannot “cherry-pick” certain
21 colleges for its proposed unit while excluding others without articulating a rational basis for
22 establishing jurisdictional walls around its proposed unit. The Albers School of Business and
23 Economics prepares its students for professions in Accounting, Finance and Marketing. The
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1 College of Education prepares its students for the education profession, with a certificate
2 program. The College of Science and Engineering prepares its students to become Engineers.
3 The College of Arts and Sciences has degree programs preparing students to become
4 Psychologists and Social Workers. These are professions as much as the practices of law and
5 nursing.

6 Based upon these facts, The Union's attempt to exclude the College of Nursing and
7 School of Law faculty from the proposed unit is entirely arbitrary. Any distinctions identified by
8 the Union are too slight or too insignificant to provide a rational basis for this proposed unit's
9 boundaries. *Specialty Healthcare*, 357 NLRB No. 83, at 13. All of these facts show that the
10 College of Nursing and School of Law faculty share an overwhelming community of interest
11 with the included employees such that there is no legitimate basis upon which to exclude them
12 from the proposed unit.

13 The Union's amended petition also seeks to exclude Clinical faculty from the proposed
14 unit. There is no justification for this exclusion, particularly because such faculty share the same
15 compensation structure, benefit eligibility, teaching conditions, lines of supervision and work
16 environment as exists for other faculty. In addition to their clinical work, they teach on campus
17 with other non-tenure track faculty whom the Union seeks to include in the proposed Unit.
18 Clinical faculty exist throughout the schools and colleges, including the School of Theology and
19 Ministry, College of Arts and Sciences, College of Science and Engineering, School of Law and
20 School of Nursing. They serve on committees, advise students and engage in service. *Tr.* 359-
21 362; *ER Ex. 15*. There is significant overlap in interests with other faculty to the extent the
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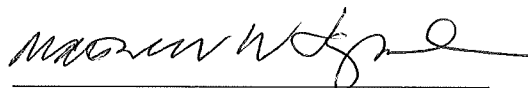
1 Union can have no legitimate basis for exclusion. Exclusion of these individuals is inconsistent
2 and not supported by law. *Odwalla, Inc., supra* at 19-21.¹⁶

3 **V. CONCLUSION**

4 For these reasons, the University requests the Board to accept review of the Regional
5 Director's Decision and Direction of Election. The Board should adhere to the D.C. Circuit's
6 test in *University of Great Falls* and dismiss the petition for lack of Board jurisdiction. In
7 addition, the University's full-time non-tenure track faculty are managerial under *Yeshiva* and
8 should not be in a unit with part-time non-tenure track faculty. The Petitioner's proposed unit is
9 not appropriate for this reason, and because of the reasons set forth in prior Board law. There is
10 no rational basis for excluding faculty from the College of Nursing and School of Law as well as
11 Clinical Faculty from the proposed unit, given those faculty members share the same work
12 factors as the Regional Director found to warrant inclusion of other faculty in the proposed unit.
13 Pursuant to 29 CFR 102.67(b), the University requests that the Board stay the election or, in the
14 alternative, impound the ballots in the election pending review of these issues and its review of
15 similar issues in other cases currently awaiting review by the Board as noted above.

16 Dated this 30th day of April 2014.

17 Respectfully submitted,

18 

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23 ¹⁶ The Regional Director observed that the University did not raise this argument at the hearing. The Petitioner,
24 however, amended its unit description without explanation after the close of the evidence on the last day of the
hearing, affording the University no reasonable opportunity to present evidence or to address the amended
description. *Tr. 1468*.